IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

MARC McCORMICK, LAURA NEWBERRY, ROGER GADDIS and CLAIRE ROBINSON DAVEY,	)	
Protestants/Petitioners,	)	
v.	)	Sup. Ct. Case No. 118,685
ANDREW MOORE, JANET ANN LARGENT and LYNDA JOHNSON,	)	
Respondents/Proponents.	)	

RESPONDENTS/PROPONENTS ANDREW MOORE, JANET ANN LARGENT AND LYNDA JOHNSON'S BRIEF IN RESPONSE TO APPLICATION AND PETITION TO ASSUME ORIGINAL JURISDICTION AND REVIEW THE CONSTITUTIONALITY OF INITIATIVE PETITION NO. 426

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ATTORNEYS FOR RESPONDENTS/ PROPONENTS

March 12, 2020

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INTRODUCTION

In yet another endeavor to keep proposed redistricting reforms off the 2020 general election ballot (and thereby ensure that, for at least one more decade, politicians in power can continue to pick their voters, rather than the other way around), Protestants have once again asked this Court to intervene and strike down Initiative Petition 426 ("IP426") as unconstitutional before it has even been circulated for signatures. But the provisions they contend are unconstitutional have uniformly been upheld in other states; the challenges they raise are questionable at best; and the provisions they seek to invalidate are severable and would not warrant striking down the entirety of the Petition in any event. As this Court held the last go-around, such challenges are not appropriate for resolution at this stage.

As explained below, Protestants have not met their burden to show IP426 is unconstitutional—much less "clearly and manifestly" unconstitutional, as required at the pre-election stage. Proponents thus request that the Court deny the protest and permit the Petition to proceed to the signature-gathering stage, so it may timely be put to a vote of the People.

ARGUMENT AND AUTHORITIES

I. Standard of Review: At the Pre-Election Stage, an Initiative Petition May Not be Invalidated Absent a "Clear and Manifest" Showing of Unconstitutionality

"The power of the people 'to institute change through the initiative process is a fundamental characteristic of Oklahoma government'": indeed, it is "[t]he first power reserved by the people." *In re Init. Pet. No. 403*, 2016 OK 1, ¶ 3, 367 P.3d 472 (quoting OKLA. CONST. art. V, § 2). As this Court has repeatedly emphasized, "[t]he right of the initiative is precious" and "one which this Court is zealous to preserve to the fullest measure of the spirit and the letter of the law." *Okla. Oil & Gas Ass'n v. Thompson*, 2018 OK 26, ¶ 4, 414 P.3d 345 (quoting *In re Init. Pet. No. 382*, 2006 OK 45, ¶ 3,142 P.3d 400).

In deference to the precious right of initiative, this Court has "consistently confined [its] **pre-election** review of initiative petitions ... to ***clear or manifest facial constitutional infirmities***." *In re Init. Pet. No. 358*, 1994 OK 27, ¶¶ 7, 12, 870 P.2d 782 (emphasis added); *see also, e.g., In re Init. Pet. No. 362*, 1995 OK 77, ¶¶ 21–22, 899 P.2d 1145, 1152. As this Court recently reiterated, constitutional review "at the pre-election stage is **discretionary**," and "[b]efore exercising this discretionary authority, we must always keep in mind 'the fundamental basis of the people's right to institute change and express their will through the initiative process.'" *In re Init. Pet. No. 420*, 2020 OK 9, ¶ 32, -- P.2d -- (emphasis in original). "'**[O]nly in the clearest cases,**'" then, is it "'warranted to interfere with the people's basic right to vote on important issues by a holding of constitutional infirmity.'" *Id.* (emphasis added). "All doubt," moreover, "is to be resolved in favor of the initiative." *In re Init. Pet. No. 348*, 1991 OK 110, ¶ 5, 820 P.2d 772 (internal quotation marks omitted).

Protestants thus bear a heavy burden: to keep this measure from proceeding to the signature-gathering stage, they must show not just that the measure is unconstitutional, but that it is "***clearly and manifestly*** unconstitutional." *Thompson*, 2018 OK 26, ¶ 6 (emphasis added). They have not done so here.

II. IP426's Provision Regarding the Counting of Incarcerated Persons, § 4(C)(3)(a), is Not Unconstitutional—Much Less "*Clearly and Manifestly*" Unconstitutional

The problems with "prison gerrymandering"—counting incarcerated persons as residents of the community in which they are incarcerated, instead of their home communities, for purposes of redistricting—are well documented.[1] Because prisons are

[1] *See, e.g.,* App. 1, Prison Policy Initiative, "The Problem"; App. 2, Kate Carlton Greer, *How Political Districts With Prisons Give Their Lawmakers Outsize Influence* (Nov. 7, 2016); App. 3, Wagner & Lavarreda, *Importing Constituents: Prisoners and Political Clout in Oklahoma* (Sep. 21, 2009); App. 4, Wang & Devarajan, *'Your Body Being Used': Where Prisoners Who Can't Vote Fill Voting Districts* (explaining that "[t]he incarcerated are not only missing from their communities"; "they are also advantaging other communities"); *see*

disproportionately built in rural areas, but most incarcerated people hail from urban areas, counting inmates where they are involuntarily incarcerated and cannot vote results in a systematic transfer of population and political clout from urban, disproportionately minority regions to rural, disproportionately white regions of the state. *Id.* This has substantial implications for our democracy. As one commenter put it, "[s]ome legislative districts draw large portions of their political clout, not from actual residents, but from the presence of a large prison in the district." App. 1.

The Census Bureau itself has acknowledged this problem. App. C at 5528. Although it has so far declined to change its own approach, citing logistical difficulties, the Bureau "recognizes that some states have decided, or may decide in the future, to 'move' their prisoner population back to the prisoners' pre-incarceration addresses for redistricting and other purposes"—and has taken steps to *facilitate* that effort. *Id.* For the 2010 census, therefore, the Bureau released population data for correctional facilities and other group quarters early, specifically "so that states can leave the prisoners counted where the prisons are, delete them from redistricting formulas, or assign them to some other locale."[2] For the 2020 census, it will go even further, releasing data earlier and offering states supplemental tools so they can more easily reallocate their prisoner population counts. App. C at 5528.

As the Census Bureau's own approach illustrates, unadjusted census figures are not sacrosanct. *See, e.g., Borough of Bethel Park v. Stans*, 449 F. 2d 575, 582 n.4 (3d Cir. 1971) ("Although a state is entitled to the number of representatives in the House of Representatives as determined by the federal census, it is not required to use these census figures as a basis for apportioning its own legislature."). Certainly, states must make "good-

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also, e.g., App. C at 5527 (discussing the thousands upon thousands of record comments explaining that "counting prisoners at the prison inflates the political power of the area where the prison is located, and deflates the political power in the prisoners' home communities").

[2] App. 5, Dir. Robert Groves, "So How Do You Handle Prisons?" (Mar. 1. 2010).

faith attempts to achieve population equality" using the "best population data available." *Karcher v. Daggett,* 462 U.S. 725, 738 (1983); *Kirkpatrick v. Preisler,* 394 U.S. 526, 528 (1969). But the Supreme Court has previously recognized that, in certain circumstances, blind reliance on unadjusted census figures to establish intrastate voting districts may be inappropriate, *Mahan v. Howell,* 410 U.S. 315, 330-31 (1973), and it has never held that their use is constitutionally required. To the contrary: the Court has recognized that population figures may be adjusted to ensure accuracy and in furtherance of valid representational choices. *See Burns v. Richardson,* 384 U.S. 73, 91, 92 (1966) ("start[ing] with the proposition that the Equal Protection Clause does not require the States to use [unadjusted] total population figures derived from the federal census as the standard by which ... substantial population equivalency is to be measured," and explicitly acknowledging states' authority to exclude, for example, "persons denied the vote for conviction of crime" from "the apportionment base"); *see also Fletcher v. Lamone*, 831 F. Supp. 2d 887, 894-95 (D.Md. 2011), *summ. aff'd*, 567 U.S. 930 (2012) (states "may choose to adjust the census data, so long as those adjustments are thoroughly documented and applied in a nonarbitrary fashion and they otherwise do not violate the Constitution"). So long as a state's efforts to "to 'correct' the census figures" are not conducted "in a haphazard, inconsistent, or conjectural manner," *Karcher*, 462 U.S. at 732 n.4, "[t]he decision to include or exclude any such group involves choices about the nature of representation with which we have been shown no constitutionally founded reason to interfere," *Burns*, 384 U.S. at 92.

Given this well-recognized leeway, and the well-documented problems with the Census Bureau's current approach to counting prisoners, multiple states have chosen to make adjustments for purposes of legislative redistricting. Laws requiring that incarcerated persons be counted in their home communities have already passed in seven other states, with more

on the way. *See* App. 6, 7. And the only courts to have addressed the issue have found such laws wholly consistent with both Article I, § 2 and the Equal Protection Clause. *See Fletcher*, 831 F. Supp. 2d at 893 (upholding a Maryland law that requires adjustment of census data to "correct for the distortional effects of the Census Bureau's practice of counting prisoners as residents of their place of incarceration"); *Little v. LATFOR*, No. 2310-2011 (N.Y. Sup. Ct. Dec. 1, 2011) (App. 8) (upholding similar New York law).

Protestants contend IP426 is arbitrary and would violate equal protection because it would "treat prisoners differently than *any other* subcategory of 'group quarters' residents recognized by the census bureau." Br. at 3 (emphasis added). As explained below, even if IP426 *did* treat prisoners differently from all other "group quarters" residents, it would not be unconstitutional. As a threshold matter, however, Protestants' premise is incorrect.

It is true that *most* people living in "group quarters," such as college housing, military barracks, and nursing homes, are counted at that "usual residence" for purposes of the census. And for good reason: most of these people actually participate—e.g., work, spend money, pay taxes, raise families, go out, engage in politics, and often ***vote***—in the communities where they (voluntarily) live, and thus are properly considered constituents of the governmental representatives of that locale. But there are notable *exceptions* to the Census Bureau's "usual residence" rule, even for those living in group quarters. For example, minor students attending boarding school, who cannot vote and are relatively self-contained, are ***not*** counted at the location where they live and sleep most of the time for purposes of the census—instead, they are counted at their parents' home address. *See* App. C at 5531, 5534.[3]

[3] Another exception: soldiers deployed overseas and soldiers stationed overseas are not counted at the facility where they live and sleep for purposes of the census. And they are treated differently from *each other*: those *deployed* overseas are counted at the stateside base from which they were deployed, while those *stationed* overseas are counted at their "home of record," or permanent address at the time they joined the military. *See* App. C at 5529 & n.8.

In any event, Protestants do not allege that other "group quarters" residents are a protected class (or, for that matter, that they are residents of these other "group quarters" and thus have standing to complain about their treatment[4]). So long as there is a *rational basis* for counting incarcerated persons at their homes rather than their place of confinement, then, the approach passes constitutional muster. *See, e.g., Gladstone v. Bartlesville Indep. Sch. Dist. No. 30*, 2003 OK 30, ¶¶ 12, 15, 18, 66 P.3d 442. And there can be no doubt such a rational basis exists here. In addition to multiple states and the Census Bureau itself, numerous courts and commenters have acknowledged the unique problems posed by the current method of counting incarcerated persons, particularly for purposes of redistricting. *See supra.*

Pointing out that most of Oklahoma's prisons are located in rural areas, which are trending conservative, Protestants declare that the "choice to count prisoners differently is partisan." Br. at 3. It is certainly true that most of the state's prisons are located in rural, predominately white areas, while much of its prison population hails from urban, high-minority areas[5]—and that the practice of counting prisoners where they are incarcerated instead of at home has thus been employed, to great effect, as a means of partisan and racial gerrymandering in Oklahoma.[6] But *ending a partisan practice* does not equate to improper partisanship. To the extent Protestants contend that partisanship in redistricting has constitutional implications, moreover, then the current practice of prison-based gerrymandering—and partisan gerrymandering in general—would seem far more constitutionally problematic. *Cf., e.g., Calvin v. Jefferson Cty. Bd. of Comm'rs*, 172 F. Supp. 3d 1292, 1315 (N.D. Fla. 2016) (concluding that counting incarcerated persons in the district

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[4] *Cf., e.g., Little v. LATFOR*, No. 2310-2011 (N.Y. Sup. Ct. 2011) (concluding, with respect to a similar "group quarters" equal protection argument, that plaintiffs had not demonstrated standing, as they had not alleged that they were part of any other "group quarters").

[5] *See, e.g.*, https://www.prisonpolicy.org/profiles/OK.html.

[6] *See, e.g.*, App. 1-4, discussed *supra.*

where they are incarcerated in some cases itself violates the Equal Protection Clause).[7]

Protestants assert that IP426 would require incarcerated persons from outside the state to be excluded from the count entirely,[8] while out-of-state college students would continue to be counted where they live. Protestants allege that, because college students are often more left-leaning, this differing treatment is proof of sheer partisanship. Br. at 3-4, 9. But *other* groups of out-of-state residents—e.g., members of the military and their families—skew *conservative*; yet they, too, would continue to be counted in their Oklahoma communities for purposes of the census. The reason IP426 would retain the current treatment of college students is *not* that they tend to be more liberal: it is that college students living on campus, like soldiers living on base, *are in fact active members of the community in which they are counted*—working, going to school, raising families, spending money, participating in politics, and, in many cases, *voting*. Prisoners are not.[9] In this sense, incarcerated persons—

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[7] Indeed, a lawsuit alleging that counting prisoners where they are incarcerated may *violate* the Constitution's one-person, one-vote principle has been permitted to proceed as a "substantial federal question." *See, e.g.*, *NAACP v. Merrill*, 939 F.3d 470 (2d Cir. 2019). If a "substantial federal question" exists as to whether the Constitution *requires* the approach adopted by IP426, *id.*, then it cannot plausibly be the case that this approach clearly and manifestly *violates* the Constitution.

[8] Contrary to Protestants' assertion (at 3), the language of IP426 does not "necessarily" require that out-of-state prisoners be excluded from the count entirely. Indeed, other states with similar requirements count prisoners without a home community in the state as residing at the facility. *See, e.g.*, Wash. Stat. 44.05.090. To the extent the former interpretation would be constitutionally impermissible, the well-known canon of constitutional construction requires the Court to adopt the latter interpretation.

[9] *See, e.g.*, App. C at 5527 (describing large volume of comments that "prisoners cannot interact with the community where they are incarcerated, are there involuntarily, and generally do not plan to remain in that community upon their release"; that "the governmental representatives of the community where the prison is located do not serve the prisoners," and "prisoners rely, instead, on the representative services of the legislators in their pre-incarceration communities"; and that counting prisoners at the facility where they are located on census day "ignores the transient and temporary nature of incarceration"); *Calvin v. Jefferson Cty. Bd. of Commissioners*, 172 F. Supp. 3d 1292, 1319, 1325 (N.D. Fla. 2016) ("The broader point—one so obvious it's properly termed a legislative fact—is that prisoners are isolated from society" and "subject to control by the authority operating the institution in which they are incarcerated"; thus, "there is no meaningful representational

held in a facility against their will, isolated from the larger community, often transient,[10] and barred from voting or participating in local politics[11]—are far more like students attending boarding school—who, notably, are currently counted at their home address, *not* where they live and sleep most of the time. *See* Ex. C at 5531, 5534.

The challengers in *Fletcher* made precisely the same argument Protestants make here: "that if [the state] wishes to correct for prisoner-related population distortions, it must also make similar adjustments to account for the distortionary effects of college students and members of the military." *Fletcher*, 831 F. Supp. 2d at 896. Noting the limited judicial scrutiny that applies to such claims, a unanimous three-judge panel, led by Fourth Circuit Judge Paul Niemeyer, flatly rejected this argument:

> To be sure, Maryland might come closer to its goal of producing accurate data if it assigned college students or active duty military personnel to their permanent home addresses for purposes of redistricting. But as with prisoners, Maryland is not constitutionally obligated to make such adjustments. Moreover, the State's failure to improve its redistricting data *even more* by determining students' and soldiers' home addresses has little bearing on the merits of the plaintiffs' Article 1, § 2 claim made with respect to prisoners.
>
> We also observe that the **plaintiffs' argument on this point implies that college students, soldiers, and prisoners are all similarly situated groups. This assumption, however, is questionable at best**. College students and

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nexus between the Boards and the inmates .... This is the essential difference between this case and a case like *Garza* in which the population whose inclusion was at issue clearly possessed representational rights that would be impaired if the population was not included in the population base.").

[10] As Protestants note, Oklahoma's federal prisons "hold prisoners from around the country," most of whom are highly transient: for example, in one year, "approximately 86,000 inmates passed through the [FTC] in Oklahoma City," with the facility "holding up to 1,500 inmates at any one time." Br. at 3 n.2; *see also* App. S, T, W (showing that the vast majority of prisoners stay in the federal facilities for less than 30 days). Yet, individuals who happen to be held there on census day are currently counted as residents of Oklahoma City for purposes of the census. *See, e.g.*, App. 4 (noting that this transience means the "facility [where] they happen to be incarcerated on Census Day is in no way reflective of the reality of where they actually even live and sleep most of the time even by the Census Bureau's own guidelines").

[11] Incarcerated persons convicted of felonies, of course, cannot vote in Oklahoma at all. But even *non-felons* do not vote where they are incarcerated; rather, they vote by absentee ballot in their home communities. *See, e.g.*, App. 13 (Oklahoma Watch).

> members of the military are eligible to vote, while incarcerated persons are not. In addition, college students and military personnel have the liberty to interact with members of the surrounding community and to engage fully in civic life. In this sense, both groups have a much more substantial connection to, and effect on, the communities where they reside than do prisoners.

831 F. Supp. 2d at 896 (emphasis added), *summarily affirmed*, 567 U.S. 930 (2012).[12]

Protestants cite *Tennant v. Jefferson Cty. Comm'n*, 567 U.S. 758, 762 (2012), and *Davidson v. City of Cranston, RI*, 837 F.3d 135, 146 (1st Cir. 2016), which they say "affirmed redistricting based on total population as determined by the Census," and "recognized states' authority to count prisoners at their usual residence." Br. at 5. But Proponents do not contend that states *lack the authority* to use unadjusted Census data or to count incarcerated persons as residents of the facility where they are held. The point, as the *Davidson* court expressly recognized, is that states *have the choice* of where to count incarcerated persons for purposes of redistricting—and courts should not interfere with this decision. *Davidson*, 837 F.3d at 143-44 ("The decision whether to include or exclude the ACI prisoners in Cranston's apportionment is one for the political process."); *see also Tennant*, 567 U.S. at 759 (reversing trial court's rejection of redistricting plan because the court "failed to afford appropriate deference to West Virginia's reasonable exercise of its political judgment"). Under IP426, Oklahoma would make the well-reasoned choice to count incarcerated persons in their home communities, a choice it is entitled to make. *Ibid.*

Similarly, Protestants point to *Kostick v. Nago*, 960 F. Supp. 2d 1074 (D. Haw. 2013), and note that the court there upheld a plan to extract (almost) *all* out-of-state residents for

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[12] Protestants attempt to discount the Supreme Court's summary affirmance, asserting—without any basis whatsoever—that it was based not on the merits, but on expediency and the fact that the population adjustments at issue "did not 'exceed 1% of a district's population.'" Br. at 6. This makes little sense: indeed, the whole point of the *Karcher* decision on which they rely is that courts are not entitled to presume an unjustified 1% population variance is *de minimis*. 462 U.S. at 725-26, 735-37. In any event, had the Supreme Court truly disapproved of the *Fletcher* court's reasoning, it easily could have said so.

purposes of redistricting. Br. at 6 (citing *aff'd*, 571 U.S. 1161 (2014)). But again, this gets it precisely backwards. Affirming a state's choice to adjust census data in one way does not mean a state's choice to do it a different way is ***un***constitutional. To the contrary: the *Kostick* court made clear that such choices are subject to only limited judicial scrutiny—a standard approximating "rational-basis review." *Kostick*, 960 F. Supp. 2d at 1091.[13]

Finally, Protestants assert, somewhat ironically, that the Supreme Court has "expressly prohibited a scheme assigning people to districts 'in which they admittedly did not reside.'" Br. at 9 (quoting *Mahan*, 410 U.S. at 332). But the reason the individuals in *Mahan* were assigned to districts where they did not actually reside was "because *that is where they were counted on official census tracts*." *Mahan*, 410 U.S. at 330-31 & n.11 (emphasis added) (explaining that, under the Census Bureau's rules, naval personnel were counted in the district where their ships were "home-ported," even if their actual homes were elsewhere). *Mahan* cannot be read to flatly prohibit counting people in locations other than where they "reside" on Census Day. (Indeed, as the Census Bureau currently counts *numerous* individuals, including deployed military, boarding school students, and snowbirds, at other locations, *see* App. C, such a rule would invalidate the redistricting plans of every state that has chosen to rely on unadjusted census data.) Rather, *Mahan* stands for the proposition that, sometimes, census data *must* be adjusted to further the constitutional goals of electoral and/or representative equality.

III. IP426's Qualifications for Serving as Commissioner Are Not Unconstitutional—Much Less "*Clearly and Manifestly*" Unconstitutional

[13] The *Kostick* court also specifically rejected the complaint, raised by Protestants here, that because most states use "the actual Census count for reapportionment," individuals who were "extracted from [that state's] population for reapportionment purposes[] are not counted anywhere." *Id.* at 1097 (concluding that "[t]his observation is an insufficient reason to conclude [the state's] reapportionment methods were unreasonable").

Protestants also challenge the portion of IP426 that sets certain qualifications for applicants to serve as Commissioner. As they did in their challenge to the prior version of this Petition (IP420), they submit that these qualifications violate their First Amendment right to associate with the party of their choice and engage in political activity. Although they cite a handful of new cases[14] and frame it somewhat differently, this is, at bottom, the same challenge this Court already determined should not be addressed pre-election. *Init. Pet. No. 420*, 2020 OK 9, ¶ 33. Like Protestants, Proponents incorporate their prior briefing. App. 9.

Protestants do raise a few new points in support of their prior arguments. But none of these points make their challenge any less premature.[15] They also lack merit.

Protestants re-urge their prior First Amendment challenge to the party-switching qualification, but they cast it now as an equal protection claim. Br. at 10. In their view, although the provision does not affect a protected class, it is nevertheless subject to strict scrutiny under the Equal Protection Clause because it "interferes with the exercise of a fundamental right"—specifically, the First Amendment right of association. *Id.* This is

[14] These cases are no better. *Autor v. Pritzker*, 740 F.3d 176 (D.C. Cir. 2014), decided at the motion-to-dismiss stage, held only that a lawsuit challenging a rule barring lobbyists from serving on any federal advisory committee had been sufficiently pleaded because, *inter alia*, the particular committee at issue was created "for the very purpose of reflecting the viewpoints of private industry"; the D.C. Circuit ultimately remanded so the parties could develop a record and the trial court could "determine in the first instance whether the government's interest in excluding federally registered lobbyists from ITACs outweighs any impingement on Appellants' constitutional rights." *Id.* at 178; *see also Autor v. Pritzker*, 843 F.3d 994, 995, 997 (D.C. Cir. 2016) (emphasizing the limited nature of its holding in *Autor I*). *Tashjian v. Republican Party of Conn.*, 479 U.S. 208 (1986), rejected the state's argument that its rule prohibiting independents from voting in party primaries was justified by an interest in preventing party raiding, *not* because this was not a sufficient state interest, but because the rule failed to further that interest, as the state's short registration deadline meant *voters could simply switch their registration for purposes of the primary*. *Id.* at 219. The Court also made clear that any such claims must be evaluated under a record-specific balancing-of-interests test, not strict scrutiny. *Id.* at 213-14.

[15] Protestants do, this time, devote substantial effort to establishing standing—at least with respect to their First Amendment challenge. But their prior failure to demonstrate standing was not the basis of this Court's prior decision that such claims should not be addressed at the pre-election stage. *See Init. Pet. No. 420*, 2020 OK 9, ¶¶ 27-30.

wholly circular. As explained in prior briefing, Protestants' First Amendment claim is subject to a lower level of scrutiny, and is meritless in any event. App. 9. Protestants cannot avoid the flaws in their First Amendment claim simply by labeling it "equal protection."

Protestants urge that the party-switching qualification is not narrowly tailored because its four-year period is longer than the six-month period for candidates for political office. Br. at 11. Of course, the fact that such restrictions already exist, without controversy, would seem to suggest they are not inherently problematic.[16] In any event, a lengthy party-switching limitation is far less necessary for candidates for public office because their party *bona fides* can be fully vetted in, *inter alia*, the party primary. Applicants for Commissioner, however, could substantially skew the effectiveness of the Commission's political balance requirements if allowed to switch their voter registration a mere six months before applying, in an attempt to game the system. (Protestants express doubt about the likelihood of such gamesmanship, Br. at 11; yet, two of them[17] appear to have switched their party registration precisely for this purpose. *See* Br. at 14; Appl. at 4-5.) Assuming, *arguendo*, that strict scrutiny applies, requiring applicants who would fill one of their party's seats on the Commission to have actually been a member of that party for two general election cycles is a narrowly tailored means of ensuring political balance.

Protestants also raise an equal protection argument with respect to families of former elected officials. They appear to concede that prohibiting *current* elected officials and their immediate families from serving on the Commission is constitutionally proper because these

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[16] *Cf., e.g., Rosario v. Rockefeller*, 410 U.S. 752, 761-62 (1973) (lengthy enrollment period designed "to inhibit party 'raiding,' whereby voters in sympathy with one party designate themselves as voters of another party so as to influence or determine the results of the other party's primary," served "legitimate and valid state goal").

[17] Claire Robinson Davey, the daughter of well-known Republicans Brett and Karma Robinson, changed her affiliation from Republican to Democrat the day IP426 was filed. *See* App. Q; App. 10; https://mmrlobby.com/brett-robinson. So did Marc McCormick. App. Q.

officials, and thus their families, have a financial interest in protecting their seats (and their party's control). Br. at 12. They urge, however, that this restriction makes less sense with respect to families of *former* elected officials. But because politician's families are not a protected class and serving on the Commission is not a fundamental right, at most Proponents need only satisfy very limited rational basis review. *Gladstone*, 2003 OK 30, ¶¶ 12, 15, 18. This test is easily satisfied here.

In addition to being more likely to be highly partisan, former elected officials, and thus their immediate families, often still have a substantial financial interest in maintaining their party's power. The "revolving door" of elected officials and lobbyists, "legislative liaisons," and "government relations experts" is well documented, and former officials have an interest in maintaining their former colleagues in power so they can better monetize those unique connections.[18] Former elected officials, as experienced politicians, are also far more likely than the general population to seek and obtain elected office in the future.[19] Thus, it is certainly rational to temporarily exclude former officials and their families from participation in the electoral line-drawing process.

This legitimate goal of preventing those with conflicts of interest from serving on the Commission is also why an individual's marital status is relevant. Proponents do not, as Protestants say, "presum[e] that a wife is bound" or "controlled" by her spouse's political views. Br. at 13. They simply recognize that a politician's spouse, regardless of gender, shares financial interests in that politician's future career that an ex-spouse typically does not.

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[18] *See, e.g.*, App. 11, 12 (noting the revolving door of elected officials and lobbyists, "legislative liaisons," and "government relations experts").

[19] *See, e.g.*, Chinoy & Ma, *How Every Member Got to Congress*, N.Y. Times (Jan. 26, 2019) ("Historically, it is somewhat rare for representatives to reach the House without holding previous political office. Nearly 200 representatives have experience in a state legislature; others were mayors, local district attorneys or state agency heads.").

Protestants rely upon *Hendricks v. Jones*, 2013 OK 71, 349 P.3d 531, which held that a provision of the Sex Offenders Registration Act, which treated people convicted of certain crimes in other states differently from those convicted of the same crimes in Oklahoma, lacked a rational basis. Of course, unlike in *Hendricks*, the qualifications here *are* rationally related to a valid state interest. Perhaps more importantly, however, even after finding the differing treatment of out-of-state convictions was unconstitutional, the Court in *Hendricks* did not purport to throw out the entirety of SORNA: rather, it simply held that Mr. Hendricks should be treated as if his conviction had occurred in the state. *Id.* ¶ 17. If, at the proper stage, the Court were to determine these qualifications are not constitutionally applied to Ms. Newberry or another plaintiff, then the proper remedy would be to hold those qualifications inapplicable to those individuals, not to strike down the entire law—and certainly not to prevent it from having the opportunity to be voted upon in the first instance.

Finally, Protestants cursorily assert that IP426 has a "retroactivity problem" because it would apply to exclude hypothetical individuals who so selectively read the paper that they learned of the re-filing of the Petition through publication of the legal notice in the classifieds rather than the front-page headlines a week earlier, Br. at 14, and an "overbreadth" issue because it applies not only to "employees" but also to "paid consultants" of the Legislature, Br. at 15. Protestants cite no legal authority and make no attempt to develop either argument. Such assertions should not be addressed by this Court at all, *see Fent v. Conting. Rev. Bd.*, 2007 OK 27, n.58, 163 P.3d 512—much less at this stage of the proceedings.

IV. Even if There Were a Concern with Either of These Provisions of IP 426, Moreover, That Would Not Warrant Striking the Petition in its Entirety

In considering Protestants' constitutional challenges, it is important to keep in mind two things: the standard and the remedy. Proponents submit there is no violation here under any standard. But even if Proponents are incorrect, it would not warrant striking the Petition.

This is a *pre-election* challenge to an initiative that has not yet even been put to a vote of the People, much less become law. As such, it is essentially a request for an advisory opinion. *Cf., e.g., Initiative Pet. No. 358*, 1994 OK 27, ¶7. Furthermore, it comes to the Court as an original action, with the attendant space limitations and abbreviated briefing schedule, and without having had an opportunity to develop the record or arguments before the trial court—a posture that is particularly problematic where Protestants allege a lack of rational basis or violation of strict scrutiny. These inherent limitations—along with the deference given to "the fundamental and precious right of initiative petition," *Thompson*, 2018 OK 26, ¶¶ 5-6—are why this Court has consistently "limited such pre-election review to clear or manifest facial constitutional infirmities." *In re Init. Pet. No. 360*, 1994 OK 97, ¶¶ 10-11, 879 P.2d 810; *see also Init. Pet. No. 420*, 2020 OK 9, ¶ 32; *In re Init. Pet. No. 363*, 1996 OK 122, ¶¶ 12-13, 927 P.2d 558. This Court has already declined to consider Protestants' First Amendment challenge to the qualifications for Commissioner at this stage, *see Init. Pet. 420*, 2020 OK 9, ¶ 33, and their new equal protection and Article I challenges are no different.

Finally, Protestants' legal protests involve only isolated provisions of the Petition. But IP 426 contains a severability clause. App. A, § 7. Even if Protestants were correct regarding § 4(C)(3)(a)'s constitutionality, then, it would not present a reason to withhold the entire Petition from the voters. *See, e.g., In re Init. Pet. No. 347*, 1991 OK 55, ¶ 24, 813 P.2d 1019; *Init. Pet. No. 358*, 1994 OK 27, ¶ 12 (both declining to address constitutional challenges where purportedly problematic provisions were potentially severable).

CONCLUSION

Proponents thus respectfully request that the Court deny Protestant's constitutional challenge and permit the initiative to proceed to the signature-gathering stage.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of March, 2020, a true and correct copy of the above and foregoing document was mailed, postage prepaid, to the following:

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